

¹ The Board notes that the February 23, 2007, document entitled Proposed Fee, which was the only document introduced that purports to set forth the agreement with El Gaucho Steakhouse, was signed by Javier E. Sacco on behalf of the steakhouse and Max Christensen. Nowhere in the document is it noted that Max Christensen signed on behalf of a corporation. Indeed, the document is captioned Max Christensen Architect. In addition, there is evidence in the record that El Gaucho Steakhouse is a corporation. But there are no allegations, however, that any party has been wrongfully named a party in this claim.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. At oral argument before the Board, however, the parties corrected claimant's average weekly wage and stipulated that claimant's average weekly wage is \$637.62.

ISSUES

This is a claim for a July 19, 2007,² accident and resulting injury to claimant's right hand. In the February 6, 2009, Award and February 6, 2009, Award Nunc Pro Tunc, Judge Klein awarded claimant permanent disability benefits for a 15 percent functional impairment to the right hand after considering the opinions of claimant's treating physician, Dr. David T. Gwyn, and claimant's medical expert, Dr. Pedro A. Murati. The Judge found Christensen and Travelers were responsible for the benefits due in this claim.

Travelers contends it is not liable for the benefits due; rather, that responsibility lies with El Gaucho and KRHA. Travelers notes that no contention has been made that Christensen was claimant's direct employer and Travelers argues that if Christensen was the general contractor, El Gaucho and KRHA would still be responsible under K.S.A. 44-503 as El Gaucho had workers compensation insurance coverage and claimant was a self-employed contractor. In addition, Travelers maintains Christensen would not have been the general contractor over any activities involving building furniture, which claimant was doing at the time of his accident. Finally, Travelers argues Christensen did not agree to provide workers compensation insurance coverage for the workers hired to work exclusively for El Gaucho.

KRHA asserts that the Board should affirm the Judge's finding that Christensen and Travelers are liable for claimant's benefits as it argues Christensen served as the general contractor and contractually committed to providing workers compensation insurance. KRHA also maintains that El Gaucho "had no workers compensation insurance available to claimant on the date of his accident."³ Moreover, KRHA maintains that regardless of whether Christensen is a general contractor or not, the contract between Christensen and El Gaucho placed liability on Christensen for all workplace injuries. In addition, KRHA argues Javier Sacco functioned as a subcontractor under Christensen and, therefore, under K.S.A. 44-503 claimant should be considered an employee of Christensen. Finally, if El Gaucho is found liable for claimant's injury, KRHA contends that claimant is entitled to benefits for a 10 percent functional impairment at the level of the right hand.

² Although there are some references in the record to a July 18, 2007, accident date, the parties stipulated the accident occurred on July 19, 2007.

³ El Gaucho and KRHA's Brief at 9 (filed Apr. 23, 2009).

Claimant contends he was paid by El Gaucho and that Christensen was apparently the general contractor; as such, he maintains he is entitled to recover from either respondent. Claimant requests that both respondents be found to be jointly and severally liable. Finally, claimant argues he has at least a 30 percent functional impairment to the right hand.

The issues before the Board on this appeal are:

1. Was claimant self-employed or was he an employee of either Christensen or El Gaucho? If claimant was an employee, who is responsible for the benefits due in this claim?
2. What is the nature and extent of claimant's injury and disability?

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

Claimant was hired in July 2007 to lay tile on the floor of the restaurant that was being built for the El Gaucho Steakhouse. After the tile work was completed in three or four weeks, claimant hung doors and began making a table for use in the restaurant. Claimant was paid by Javier Sacco with checks drawn on an El Gaucho account. Sacco testified he was the owner of El Gaucho.⁴ No taxes were withheld from claimant's pay.

On July 19, 2007, while cutting a piece of wood used in making a serving table for the restaurant, claimant almost severed his right small finger. Claimant was taken to the Wesley Medical Center emergency room. His finger was eventually amputated by Dr. David T. Gwyn. Claimant never returned to work on the restaurant, which opened in August 2007.

Claimant learned of the work at the restaurant through his brother-in-law, who began working there and the next day introduced claimant to Sacco. When claimant started, some construction work had already been completed on the interior and other workers were working at the site, which was in a strip mall.

⁴ Sacco Depo. at 5.

Independent contractor versus employee

The property being developed into the El Gaucho restaurant was owned by Mark Nordyke. When El Gaucho made arrangements to lease the space it was unfinished and even lacked a floor. Accordingly, Nordyke agreed to build the interior walls, bathrooms, and concrete floor. In turn, El Gaucho would construct the remainder of the interior. And in February 2007, El Gaucho entered into an agreement with Max Christensen, an architect. The document signed by Sacco on behalf of El Gaucho and Max Christensen provided that the latter would provide the following services:

Pull permits, Oversee Construction quality with the subcontractors and call for inspections.

Mechanical Engineering, Electrical Engineering and Architectural (With Auto Cad From Your Draftsman).

Plumbing permit with your subcontractor and my quality control.⁵

And for those services, the document provided that Christensen was to be paid \$11,000. Christensen did all the architectural plans for the restaurant. And, as it turned out, Sacco hired and paid various contractors as he was intent on minimizing costs.

Claimant testified that Sacco hired him to work at \$15 per hour. According to claimant, Sacco told him what to do on a daily basis and claimant did not take directions from anyone else. Moreover, claimant testified Sacco owned the circular saw that was being used when the accident occurred. Before the El Gaucho job, claimant worked for an individual for approximately one year remodeling houses. The El Gaucho job was the first time claimant worked on a commercial project. He is not a U.S. citizen and he cannot legally work here.

Claimant has never met Max Christensen and he does not know anything about the Christensen Company. Claimant did not perform any plumbing or electrical work on the restaurant.

In addition to the agreement between Christensen and El Gaucho, Christensen had a separate contract with Nordyke to do the construction work Nordyke was obligated to perform; namely, installing a concrete floor, constructing the interior walls, constructing the bathrooms, and installing plumbing. Max Christensen, the architect who operated the Christensen Company, testified that Sacco retained control of the interior finish and interior design of the restaurant. In addition, Max Christensen testified the decision to tile the floor

⁵ P.H. Trans., Resp. Ex. 1.

(and thus hire claimant and others to perform that work) was Sacco's. Accordingly, Max Christensen maintains that at the time of the accident claimant was performing work other than what was contemplated in the contracts with either El Gaucho or Nordyke.

Following the accident, Sacco contacted Max Christensen about claimant's accident and the name of Christensen's insurance company. But Max Christensen denied responsibility. Ultimately, a claim was made on El Gaucho's insurance carrier.

Sacco advertised on a Spanish-speaking radio station for individuals to work on the restaurant project. But Sacco denies hiring claimant, or any others, as he maintains that Christensen had a foreman (Daniel Zamora) at the site who did the hiring. Sacco also contradicts claimant's testimony that claimant never met Max Christensen. Moreover, Sacco testified El Gaucho's workers compensation insurance policy was purchased to only cover those employees who were to work in actually operating the restaurant. The Board finds Sacco's testimony less than persuasive.

The Board finds the greater weight of the evidence indicates that claimant was not performing work at the time of his accident that was the responsibility of Christensen as contemplated by the agreement between Christensen and El Gaucho or by the agreement between Christensen and Nordyke. The Board also finds claimant was neither a subcontractor nor working for a subcontractor of Christensen. Likewise, the Board concludes claimant was neither a subcontractor nor an employee of a subcontractor working for El Gaucho.

Instead, the Board finds the more credible evidence establishes that Sacco, who was acting on behalf of El Gaucho, hired claimant to work on an hourly basis on the interior of the restaurant and claimant was performing such work when his accident occurred. Sacco controlled and directed claimant's daily activities. The Board concludes claimant was an employee of El Gaucho at the time of his accident.

Nature and extent of injury and disability

The record holds two opinions regarding claimant's functional impairment. Claimant's medical expert, Dr. Pedro A. Murati, examined claimant in April 2008 and concluded claimant sustained an impairment to the right hand of 30 percent, which included a 10 percent impairment to the hand for the amputation of the small finger and a 22 percent impairment to the hand for loss of grip strength.

The surgeon who amputated claimant's finger, Dr. Gwyn, indicated claimant's amputation of the right small finger went through the level of the metacarpal and he rated claimant as having a 100 percent impairment of the right small finger, which was equivalent to a 10 percent impairment of the right hand.

Both doctors allegedly used the AMA *Guides*⁶ to rate claimant. The Judge applied a weighted average to those impairment ratings and found that claimant had sustained a 15 percent impairment to the hand. The Board adopts that conclusion as its own.

CONCLUSIONS OF LAW

El Gaucho maintains that it does not have workers compensation insurance coverage on claimant as it purchased insurance coverage only for restaurant operations. Accordingly, El Gaucho asserts that Christensen should be liable under K.S.A. 44-503, the statute dealing with subcontractors. The Board disagrees.

First, K.S.A. 44-503 is not applicable as claimant was not performing work that Christensen had contracted to perform. Moreover, claimant was not employed by one of Christensen's subcontractors. The purpose of K.S.A. 44-503 is to give employees of a subcontractor a remedy against a general or principal contractor and to prevent employers from evading liability under the Workers Compensation Act by contracting with outsiders to do work undertaken as a part of the employer's trade or business.⁷ The statute provides, in part:

Where any person (in this section referred to as principal) undertakes to execute any work which is a part of the principal's trade or business or which the principal has contracted to perform and contracts with any other person (in this section referred to as the contractor) for the execution by or under the contractor of the whole or any part of the work undertaken by the principal, the principal shall be liable to pay to any worker employed in the execution of the work any compensation under the workers compensation act which the principal would have been liable to pay if that worker had been immediately employed by the principal;
. . . .⁸

In the event that the payment of compensation is not secured [by the contractor] or is otherwise unavailable or in effect, then the principal shall be liable for the payment of compensation. . . .⁹

⁶ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

⁷ *Bright v. Cargill, Inc.*, 251 Kan. 387, 837 P.2d 348 (1992); *Atwell v. Maxwell Bridge Co.*, 196 Kan. 219, 409 P.2d 994 (1966).

⁸ K.S.A. 44-503(a).

⁹ K.S.A. 44-503(g).

As indicated above, claimant was an employee of El Gaucho at the time of his accident. El Gaucho was not a subcontractor of Christensen. Likewise, the Board rejects the argument that Sacco, individually, was a subcontractor of Christensen making claimant a statutory employee of Christensen under K.S.A. 44-503. The evidence does not establish that Sacco, individually, was a subcontractor engaged in construction work.

When stipulations were taken at the regular hearing, El Gaucho and KRHA indicated they were subject to the Workers Compensation Act.¹⁰ No issue was raised at that time concerning El Gaucho's insurance coverage; namely that it allegedly only extended to employees who worked in the actual operation of the restaurant and not to claimant. But El Gaucho now makes that argument. Indeed, the record contains very little about El Gaucho's workers compensation insurance coverage. Sacco testified, in part:

Q. (Mr. Cline) Now you had insurance then through the Kansas Restaurant and Hospitality Association?

A. (Mr. Sacco) Yes, sir.

Q. Or "you," I mean El Gaucho Steakhouse?

A. Yes, sir.

Q. Is that a separate -- is that a separate corporation, El Gaucho?

A. Separate corporation? I'm sorry, sir, I don't understand the question.

Q. Is El Gaucho Steakhouse a corporation?

A. It's only one corporation.

Q. It is a corporation?

A. Yeah.

Q. Okay. I didn't know, it's not a sole proprietor, it's not just run -- or is it?

A. No, no, it's one -- El Gaucho is one corporation, and we hire the restaurant association for the insurance for the restaurant purpose. Only for the restaurant.

¹⁰ R.H. Trans. at 7.

We sign agreement for the restaurant, not for the construction, not for another job or whatever. Not for my car, not for my house, only for the restaurant.¹¹

The Board rejects El Gaucho's argument it has no workers compensation insurance coverage for claimant's accident because claimant was not involved in restaurant operations. First, KRHA did not raise that issue to the administrative law judge when stipulations were taken at the regular hearing. To the contrary, KRHA's attorney indicated his party was subject to the Workers Compensation Act in the event this claim was compensable.¹² Second, Sacco's testimony that El Gaucho's workers compensation coverage was only for those involved in the restaurant operations is not credible in light of K.S.A. 44-559, which provides:

Every policy of insurance against liability under this act shall be in accordance with the provisions of this act and shall be in a form approved by the commissioner of insurance. **Such policy shall contain an agreement that the insurer accepts all of the provisions of this act, that the same may be enforced by any person entitled to any rights under this act** as well as by the employer, that the insurer shall be a party to all agreements or proceedings under this act, and his appearance may be entered therein and jurisdiction over his person may be obtained as in this act provided, and such covenants shall be enforceable notwithstanding any default of the employer. (Emphasis added.)

Accordingly, the Act prohibits employers from limiting coverage to any particular class or classes of employees as El Gaucho now asserts. In summary, should KRHA have desired to raise an insurance coverage issue it should have done so at the time of regular hearing.

Finally, the Board rejects El Gaucho's argument that Christensen agreed to provide workers compensation insurance coverage for all who worked on the restaurant project. Christensen did not agree to that. The statement about insurance in the February 23, 2007, document entitled Proposed Fee is merely a statement that Christensen had workers compensation and liability insurance coverage, a fact that was relevant for licensing purposes and a fact that would be relevant in the event a subcontractor's employee might be injured. In addition, El Gaucho's argument that estoppel should prevent Christensen from denying he had workers compensation insurance coverage for claimant is misplaced as there would exist an adequate legal remedy for that alleged breach of contract. And, in general, equitable remedies are not available if there is an adequate remedy at law.¹³

¹¹ Sacco Depo. at 38, 39.

¹² R.H. Trans. at 7.

¹³ *Nelson v. Nelson*, ___ Kan. ___, 205 P.3d 715 (2009); *Mid-America Pipeline Co. v. Wietharn*, 246 Kan. 238, 787 P.2d 716 (1990).

In conclusion, El Gaucho and KRHA are responsible for providing the workers compensation benefits that claimant is entitled to receive in this claim. Consequently, the Award and Award Nunc Pro Tunc should be modified.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.¹⁴ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board modifies the February 6, 2009, Award and February 6, 2009, Award Nunc Pro Tunc entered by Judge Klein to assess liability against El Gaucho Steakhouse and Kansas Restaurant & Hospitality Association and to compute claimant's award considering the stipulated average weekly wage of \$637.62. The Board affirms the finding and conclusion that claimant is entitled to receive workers compensation benefits for a 15 percent impairment to the hand.

Ernesto Trevizo is granted compensation from El Gaucho Steakhouse and its insurance carrier, Kansas Restaurant & Hospitality Association, for a July 19, 2007, accident and resulting disability. Based upon an average weekly wage of \$637.62, Mr. Trevizo is entitled to receive 5.71 weeks of temporary total disability benefits at \$425.10 per week, or \$2,427.32, plus 21.64 weeks of permanent partial disability benefits at \$425.10 per week, or \$9,199.16, for a 15 percent permanent partial disability, making a total award of \$11,626.48, which is all due and owing less any amounts previously paid.

The Judge approved the fee arrangement with Mr. Cline, claimant's present attorney. The administrative file, however, includes a lien for attorney fees filed by R. Todd King of the Accident Recovery Team, P.A., which was not addressed. Accordingly, the order approving attorney fees is set aside. When attorney fees are considered, the Judge is directed to also consider Mr. King's lien.

Administrative costs are assessed against El Gaucho Steakhouse and its insurance carrier, Kansas Restaurant & Hospitality Association.

The Board adopts the findings and conclusions set forth in the February 6, 2009, Award and February 6, 2009, Award Nunc Pro Tunc to the extent they are not inconsistent with the above.

¹⁴ K.S.A. 2008 Supp. 44-555c(k).

IT IS SO ORDERED.

Dated this ____ day of July, 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James A. Cline, Attorney for Claimant
R. Todd King, Attorney of Accident Recovery Team, P.A.
Dallas L. Rakestraw, Attorney for El Gaucho and KRHA
William L. Townsley, III, Attorney for Christensen and Travelers
Thomas Klein, Administrative Law Judge